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THE CLAYTON-BULWER TREATY.

BY MAYO W. HAZELTINE.

THE September number of this REVIEW devoted some fourteen pages to an article by Mr. James Gustavus Whiteley on the diplomacy of the United States in regard to Central American canals. The article is, substantially, a plea for our adherence to the Clayton-Bulwer treaty, and, as such, it must be acknowledged to be, perhaps, the most effective argument on that side of the discussion which has yet been published. It is worth while, therefore, to examine the points made by the writer, and inquire what weight they ought to have with the present administration. It has been, undoubtedly, the disposition of the Republican party during the last thirty years to regard the treaty either as having been extinguished by lapse of time or as deserving of abolition by a declaration on our part that we will be bound by it no longer. In other words, the treaty has been pronounced either void or voidable, and, in the latter case, it has been urged that the proper proceeding to annul it ought to be promptly taken. A different view of our duty or interest in the premises was indicated by our State Department during the two administrations of Mr. Cleveland. Will Mr. McKinley adopt the opinions of his Republican forerunners or those of his Democratic predecessor touching the vital question whether a canal cleaving the Nicaragua Isthmus shall be controlled exclusively by the United States, or whether, in pursuance of the Clayton-Bulwer Treaty, it shall remain forever under the joint control of this country and Great Britain?

I.

The Clayton-Bulwer treaty contained no denunciation clause, but, on the contrary, declared itself to be of perpetual obligation. For this reason the British Foreign Office has proceeded on the

assumption that the treaty is still binding, notwithstanding the repudiation of it by Secretary Frelinghuysen in his well-known dispatch of May 8, 1882, to Mr. Lowell, then American Minister at the Court of St. James's. In order that the present position of the question may be clearly understood, it is necessary to set forth distinctly the purport of that dispatch, which, it seems to us, is given but imperfectly by Mr. Whiteley in his article. It will be remembered that Lord Granville, throughout the correspondence on the subject, which had taken place in 1881-82, proceeded on the assumption that the Clayton-Bulwer Treaty is permanently binding on this country, and that the rights of Great Britain in relation to the whole North American isthmus are defined in that instrument. It was, of course, the eighth article on which he relied, all the rest of the treaty being admitted on both sides to refer exclusively to a particular canal contemplated in 1850, not long before which date certain privileges had been granted by the Nicaragua government to an American company which hoped to secure the whole or a part of its capital in London. The eighth article provided that "the governments of the United States and Great Britain, having not only desired in entering into this convention to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations to any other practicable communication, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama." It was, undoubtedly, a mistake to hold, as Mr. Frelinghuysen originally did, that the treaty, even if acknowledged to be still obligatory upon the parties with regard to certain matters, does not, when rightly interpreted, compel the United States to recognize in Great Britain a joint right of protectorate over the waterway projected and partly constructed by M. de Lesseps at Panama, or, we may add, over the Nicaragua Canal, now projected by an American company. According to Mr. Frelinghuysen, the eighth article of the treaty on which the British claim of joint control is founded, contemplates only those "interoceanic communications, whether by canal or railway, which are *now* (1850) proposed to be established by the way

of Tehuantepec or Panama." The Lesseps canal had not been thought of in 1850; much less had the present Nicaragua Canal company; these could not, therefore, it was claimed, have figured among the modes of communication which the treaty had in view. This point was not well taken. As a matter of fact, the explicit reference in Article 8 to communications already projected in 1850 is a supplementary, but by no means exhaustive, explanation of the preceding sentence, wherein the parties, desiring "to establish a general principle, agreed to extend their protection by treaty stipulations to any other practicable communication, whether by canal or railway, across the isthmus which connects North and South America." Unquestionably, if the treaty remains binding at all, the general principle thus distinctly enunciated must be held to cover the Lesseps canal, the Nicaragua Canal now projected, or any future waterway. Equally difficult of maintenance seems another position originally assumed by Mr. Frelinghuysen, that the British government, never having set up any pretensions to a joint guarantee of the Panama Railway, which was an enterprise of later date than the treaty, had thereby admitted that such subsequent undertakings were without the purview of the Clayton-Bulwer convention. Surely it cannot be seriously urged that, because Great Britain neglected to enforce a treaty privilege in the case of the Panama Railway, in the operation whereof she was but slightly interested, she must be held to have waived all rights in relation to water communication, which would be to her a matter of vital concern. No! Unless the Clayton-Bulwer Treaty can be shown to have lapsed, or to be voidable at the option of the United States, Article 8 will probably be found a formidable obstacle to our denial of the British claim to exercise a joint protectorate over any waterway cut through the American isthmus, and, consequently, over the Nicaragua Canal now projected by an American company.

II.

It was in his dispatch of May 8, 1882, that Mr. Frelinghuysen, quitting the unsatisfactory positions just outlined, proceeded to aver, first, that the Clayton-Bulwer treaty had lapsed, having been framed for a specific object, which had long ceased to be capable of accomplishment; and, secondly, that it was voidable at the option of the United States, having been long violated by

the other party to the contract. It is with respect to the second contention that the argument seems to us to rest on solid ground. The first assertion, namely, that the treaty had lapsed, could not be maintained, had Great Britain, upon her own part, observed the obligations imposed upon her by the treaty. For, while it is true that one aim of that convention was to facilitate the construction of a particular canal across the Isthmus of Nicaragua under a concession granted to an American company, it is equally certain that another purpose was to obtain from Great Britain a relinquishment of the projects of annexation implied in an assumption of a protectorate over the Mosquito Coast, as well as in the occupation of Greytown and divers other points on the Atlantic Coast of Nicaragua and Costa Rica. So far as the text of the treaty actually ratified is concerned, the British government agreed not to claim or exercise sovereignty over any part of Central America. Here was offered a valuable consideration, and, had it been forthcoming, the eighth article of the treaty, which is general in its scope and concedes to Great Britain rights in connection with the whole American Isthmus, from Panama to Tehuantepec inclusively, would still be unquestionably valid, notwithstanding the first seven articles, relating to a particular canal scheme, have become inoperative through the lapse or supersession of the privileges granted before 1850 to an American company. We cannot say, therefore, that the agreement set forth in the eighth article has lapsed, for the interest it was intended to subserve is a continuous interest. The article in question distinctly recites, we repeat, that the two governments, "having not only desired to accomplish a particular object, but also to establish a general principle, hereby agree to extend their (joint) protection by treaty stipulation to any other practicable communication." We consider it plain that so long as the consideration offered by Great Britain was forthcoming, the compact embodying this broad principle could not be said to have become inoperative through the mere passage of time or by the failure of the specific project contemplated in the first seven articles of the convention.

Although, however, the Clayton-Bulwer treaty had not lapsed in the legal sense of the word, when Mr. Frelinghuysen suggested that it should be so regarded, we have no doubt that he was right in saying that it had long been rendered voidable at

the option of the injured party by the act of Great Britain. The promise to forego the exercise of sovereignty in Central America, which was the consideration moving us to assent to the eighth article, if not to the rest of the treaty also, has never been carried out by the United Kingdom ; on the contrary, it has been, and now is, flagrantly violated. Scarcely had the treaty been ratified when Sir Henry Bulwer filed a declaration in our State department that, according to the understanding of Her Majesty's government, the treaty did not apply to the British "settlement" in Honduras. Mr. Clayton answered that he so understood the treaty, though he must not be supposed, he added, to affirm the British title to that settlement. Now, these declarations have never been ratified by the treaty-making authorities, and, so far as they imply anything counter to the text of the treaty, they are utterly destitute of power to bind us. That Mr. Clayton did not protest against Sir Henry Bulwer's assumption was owing to the fact that the "settlement," of which the latter spoke, was a very different thing from the present "crown colony" of British Honduras. The British settlers in those parts were, originally, mere tenants of the Spanish Crown, under limited grants which reserved sovereignty ; and after the revolution in Central America, the rights appertaining to dominion must be deemed to have passed from Spain to a Spanish-American republic. We repeat that if Mr. Clayton acquiesced in Sir H. Bulwer's assumption, it was because the so-called settlement of British subjects in the Belize was not then, nor was for years afterwards, supposed to involve any claim of sovereignty, being based on rights to cut wood and establish saw mills within a carelessly defined territory. It was taken for granted in 1850, and for years afterward, that all the powers of civil and military government within that area belonged to the South American republic which had succeeded to the political rights of Spain. We need not recapitulate the steps by which this tolerated settlement of woodcutters was gradually transformed into a crown colony, over which the exercise of British sovereignty became open and absolute. British Honduras now embraces nearly 14,000 square miles, or double the area of the State of Massachusetts, and, moreover, is continually growing at the expense of Guatemala, the boundary on that side being undefined. In other words, it constitutes precisely the entering

wedge, which might carry the British colonist with his projects of annexation into the heart of Central America, and which it was one object of the Clayton-Bulwer treaty to remove.

It was not until 1862 that the decisive step was taken whereby the "settlement" of British woodcutters in the Belize was erected into a crown colony. The step was taken, it will be observed, at a time when our government, overwhelmed by the anxieties and burdens of a tremendous civil war, could not be expected to heed, or, if heeding, to protest against, an infringement of treaty obligations in a matter which, however important in itself, must then have seemed insignificant compared with the threatened existence of the nation. Then it was, however—in 1862—that the Clayton-Bulwer treaty was unequivocally broken by one of the parties, and it follows that from that moment the whole compact was voidable at the option of the United States. That right of option was exercised by Secretary Frelinghuysen when he declared the treaty henceforth void and of no effect.

Mr. Frelinghuysen's declaration would have disposed of the Clayton-Bulwer treaty but for the fact, which Mr. Whiteley does not fail to note, that Mr. Cleveland, on two occasions, namely, in 1888 and in 1894, recognized the Clayton-Bulwer treaty as still binding on both parties, by invoking that convention for the purpose of averting any interference on the part of Great Britain in behalf of the Mosquito Indians. It is that retreat from Mr. Frelinghuysen's position which renders it indispensable that the present Administration shall announce clearly and speedily its attitude with reference to the Clayton-Bulwer treaty. Does it agree with President Arthur's Secretary of State that the convention was rendered voidable at our option in 1862 by Great Britain's assumption of sovereignty in British Honduras, and that the right of denunciation thus acquired was duly and definitely exercised by Mr. Frelinghuysen in May, 1882? If such, indeed, be its view of the matter, the contrary opinion implied in the correspondence of our State Department during the two Cleveland administrations cannot be too quickly disavowed.

III.

We have said that we consider Mr. Frelinghuysen's averment that the Clayton-Bulwer treaty was rendered voidable at our option by the action of the British government in the matter of

British Honduras not only "ingenious," as Mr. Whiteley would describe it, but as incontrovertible. Let us assume, however, that, technically, the Clayton-Bulwer treaty is, in international law, what its terms declare it to be, perpetually binding on the United States. Does it follow that, in the interest of the national expansion, which will acquire enormous momentum in the twentieth century, we ought not to burst the bond? Is it morally justifiable for one generation to stifle and handcuff another, which, in respect of political and economical conditions, may be separated from it by an immeasurable gulf? To such an exercise of anticipatory repression it must be possible to plead, in the forum of international equity, a statute of limitations. The swaddling-clothes of an infant commonwealth should not be suffered to strangle a nation in its manhood. Such was the conviction of our fathers. Never was there a treaty more obligatory from the moral viewpoint than that concluded between the Continental Congress and the French government, because the consideration offered was the assistance indispensable to the achievement of our independence. Nevertheless, not twenty years had passed after the signing of that convention when our fathers repudiated its obligations because they believed them irreconcilable with the true interest of the nation. On its face and in its essence, the Jay Treaty with Great Britain was incompatible with the treaty made many years before with France. Again, it may be said with truth that treaties, sacred as they are, are no more binding upon us than is the Federal Constitution. Now, not only the whole Federalist party, but a large proportion of Jefferson's friends, and, what is more to the point, President Jefferson himself, considered the purchase of the Louisiana Territory of very doubtful constitutionality. Nevertheless, President Jefferson made up his mind to purchase the Territory because he believed in the maxim *Salus reipublicæ suprema lex*, and because he held that the pledges of self-restraint entered into by one generation, ignorant of future exigencies, ought not to tie the hands of its successors. In the history of every nation capable of a superb development, the time has come when it has ruptured the withes imposed upon it by treaty. Where would Germany be to-day if Frederick the Great had adhered to the compact by which Prussia had bound herself to the father of Maria Theresa? The unity of Italy would still be unaccomplished had Victor Emanuel respected in

1870 the treaty made with Napoleon III., which bade the former leave unassailed the sovereignty of the Pope in Rome. How many treaties has England broken in the course of her splendid progress toward a world-dotting empire? From the international viewpoint, the position of the United States in 1850 differed by almost the whole diameter of actual and aspirational being from the acknowledged and prospective situation which they occupy to-day. The change, indeed, may be described by Mr. Whiteley as only a "development," but as truthfully may it be said that the Roman Empire in the time of Augustus was but the development of a polity started many centuries before upon a few hills beside the Tiber. But was the rule of political conduct, nay, was the text of treaties, which had shaped the political course of Rome when, as yet, she aspired not beyond the territory between the Po and the Straits of Messina, to govern her international action when her vast transmarine possessions, and the incidental interests and duties, compelled her to police the Adriatic and to uphold the Roman peace throughout the Mediterranean world? So there was a time, some fifty years ago, when the interests of Great Britain in North America might be reasonably compared by statesmen with ours. Such a comparison to-day would be absurd. Our Pacific States are already equal in wealth and population to many a European kingdom, and are increasing at a rate that must soon place them on a level with Spain, if not with Italy. Will it be said that the thinly-peopled settlements in British Columbia give Great Britain an equal claim in the forum of public equity to a control of the Isthmus waterway, which will give marine communication to our Pacific and Atlantic States?

It is as true of nations as it is of individuals that, when we are men, we should put away childish things. Among the baubles that satisfied or amused our national childhood may be reckoned the Clayton-Bulwer treaty. On general principles of national development, the time would now have come to cast it aside, if it had not been already rendered voidable at our option by an act of the other party, and if that option had not been exercised in 1882 by Mr. Frelinghuysen.

M. W. HAZELTINE.